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AUG 27 2003

GENERAL COUNSEL
OF COPYRIGHT

In the Matter of

DISTRIBUTION OF THE 1998 AND 1999
CABLE ROYALTY FUNDS

)
)
) Docket No. 2001-8 CARP 98-99
)
)
)

**MOTION OF THE PUBLIC TELEVISION CLAIMANTS
TO STRIKE PORTIONS OF PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW RELYING ON CALCULATIONS
AND TESTIMONY NOT ADMITTED INTO THE RECORD**

The Public Television Claimants respectfully request that the Copyright Arbitration Royalty Panel strike portions of the Program Suppliers' Proposed Phase I Findings of Fact and Conclusions of Law ("PS Proposed Findings and Conclusions") and the Proposed Findings of Fact and Conclusions of Law of the Joint Sports Claimants ("JSC Proposed Findings and Conclusions"), filed on August 22, 2003, because they are based on exhibits that were not admitted into the record as substantive evidence.¹ While the passages at issue are unlikely to be of importance in this proceeding, Public Television feels obliged to bring this motion to avoid

¹ Section 251.52(c) of the Rules of the Copyright Office states that proposed findings of fact "shall contain appropriate citations to the record for each evidentiary fact." 37 C.F.R. § 251.52 (c). Throughout the hearings in this proceeding, it has been clear that facts in cross-examination exhibits admitted for impeachment purposes and not as substantive evidence are not part of the record. As Judge von Kann stated, "the main Rubicon is the distinction between that which is substantive evidence of the facts shown and that which is simply part of the sort of cross examiner's collection of visuals." Tr. 1206. A cross-examination exhibit offered for impeachment is "simply an illustration" and its substance is to be given "no independent validity." Tr. 1207. In addition, while the CARP is not bound by the Federal Rules of Evidence, it is worth noting that Federal Rule of Evidence 105 requires a court to restrict evidence admitted for a limited purpose "to its proper scope." Fed. R. Evid. 105.

any later uncertainty about whether the facts asserted are in evidence (and to avoid any later suggestion that it waived the issue by failing to object).

I. JSC EXHIBIT 56-RX WAS ADMITTED ONLY FOR IMPEACHMENT AND THEREFORE CANNOT BE USED AS A BASIS FOR PROPOSED FINDINGS AND CONCLUSIONS.

JSC Exhibit 56-RX, "Cable Operator PTV Values Compared to PTV DSE Values, 1998-1999," was introduced by counsel for the Joint Sports Claimants during cross-examination of PTV rebuttal witness Dr. Leland Johnson (Tr. 9287) and was admitted only for impeachment (Tr. 9295). However, at pages 215-16 of their Proposed Findings and Conclusions, Program Suppliers cite JSC Exhibit 56-RX as substantive evidence, stating that "[t]he attitudes of cable operators [are] demonstrated by JSC Exhibit 56-RX" PS Proposed FOF/COL at 215. Program Suppliers further put forth figures taken from JSC Exhibit 56-RX as substantive evidence. *See* PS Proposed FOF/COL at 215-16.

Because JSC Exhibit 56-RX was admitted only for the limited purpose of impeachment, it cannot properly be relied on as substantive evidence. Accordingly, these statements based on this exhibit should be stricken.

II. JSC EXHIBIT 57-RX WAS NOT ADMITTED AS SUBSTANTIVE EVIDENCE AND THEREFORE CANNOT BE USED AS A BASIS FOR PROPOSED FINDINGS AND CONCLUSIONS.

JSC Exhibit 57-RX, which reproduces portions of 1991 testimony before the House Subcommittee on Telecommunications and Finance regarding the 1992 Cable Act, was introduced by JSC counsel during cross-examination of PTV rebuttal witness John Wilson (Tr. 9582) and initially was admitted only for impeachment (Tr. 9599). After later discussion among counsel and the Panel, JSC Exhibit 57-RX was admitted further as evidence that the testimony in the exhibit was given in 1991 by Henry Becton, the president and general manager of WGBH, but the exhibit was not admitted for the truth of its assertions. Tr. 9630-32. Indeed,

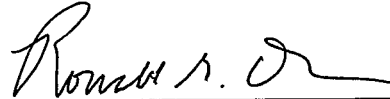
JSC counsel stated that “I’m not offering it for the truth of various assertions.” Tr. 9631. And Judge von Kann confirmed that the exhibit was received only “as official notice that those statements were made by the parties that made them.” Tr. 9632. In a later discussion regarding similar exhibits of comments filed in an administrative rulemaking, Judge von Kann reiterated that exhibits of testimony in legislative and rulemaking proceedings were admitted “not for the truth of the content but for the fact that [a party] took those positions.” Tr. 10234.

Both JSC (at ¶ 353) and Program Suppliers (at subsection X.D, pages 216-17) of their Proposed Findings and Conclusions rely on JSC Exhibit 57-RX for the truth of its assertions, citing this exhibit as substantive proof of matters stated in that 1991 testimony. This reliance on JSC Exhibit 57-RX for the truth of its assertions is improper because the exhibit was not admitted into the record for that purpose. Accordingly, JSC’s assertions in ¶ 353 and Program Suppliers’ assertions in subsection X.D at pages 216-17, that quote, cite, or rely on JSC Exhibit 57-RX as substantive evidence should be stricken.

CONCLUSION

For the reasons stated above, the Panel should strike all passages of PS and JSC Proposed Findings and Conclusions that quote, cite, or rely on JSC Exhibits 56-RX and 57-RX as substantive evidence of facts contained in the exhibits.

Respectfully submitted,



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August 27, 2003

CERTIFICATE OF SERVICE

I, Ronald G. Dove, Jr., hereby certify that I have caused copies of the MOTION OF THE PUBLIC TELEVISION CLAIMANTS TO STRIKE PORTIONS OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RELYING ON CALCULATIONS AND TESTIMONY NOT ADMITTED INTO THE RECORD, to be delivered August 27, 2003, to the following claimants participating in these Phase I proceedings:

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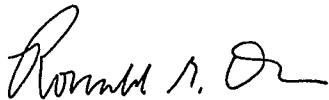
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**Re: Distribution of 1998 and 1999 Cable Royalty Funds,
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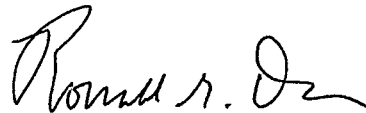
Dear Sir:

Enclosed please find an original, five copies, and an extra copy for date-stamping of the MOTION OF THE PUBLIC TELEVISION CLAIMANTS TO STRIKE PORTIONS OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RELYING ON CALCULATIONS AND TESTIMONY NOT ADMITTED INTO THE RECORD in the above-captioned proceeding. The certificate of service is included following the pleading.

Please date-stamp the extra copy and return it to the waiting messenger.

Thank you.

Sincerely,



Ronald G. Dove, Jr.

Counsel to Public Television Claimants

Enclosure
RGD/rf